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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

ENRIQUE JEVONS, as managing member of Jevons Properties LLC, FREYA K. BURSTALLER as trustee of the Freya K. Burgstaller Revocable Trust, JAY GLENN and KENDRA GLENN,

Plaintiffs,

vs.

JAY INSLEE, in his official capacity as Governor of the State of Washington and ROBERT FERGUSON, in his official capacity of the Attorney General of the State of Washington,

Defendants.

No. 1:20-CV-03182-SAB

Plaintiffs' Opposition to Defendants' Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment

Oral Argument Scheduled for July 1, 2021

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INTRODUCTION

Plaintiffs file this Opposition to Defendants' Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment. Because the arguments are overlapping, Plaintiffs incorporate both documents in one and deal with each issue as they relate to both motions.

STATEMENT OF FACTS

Plaintiffs file their own Response to Defendants' Statement of Material Facts not in Dispute and Statement of Disputed Facts.

ARGUMENT

I
The Court possesses subject matter jurisdiction.

Defendants' first argument is that the Court lacks subject matter jurisdiction on the bases that Plaintiffs lack standing, that their claims are moot, that the Governor has Eleventh Amendment immunity and the Court cannot enjoin violations of state law. ECF 30, at 26-31.[1] Each is addressed in turn.

A. Plaintiffs have standing.

Defendants' argument that Plaintiffs lack standing argument is based on the idea that the CDC moratorium prohibited evictions and, therefore, Plaintiffs were not harmed by the Proclamations. For three reasons these bases for an argued lack of standing fail.

First, Plaintiffs are challenging more than a moratorium on evictions. While Defendants repeatedly characterize this case as being about the eviction moratorium

[1] Herein, citations to filings use the ECF page numbers at the top of each page.

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and relying on cases from other states where an eviction moratorium was at issue, Plaintiffs are challenging the Proclamations in their entirety. *See* ECF 27 (Amended Complaint). For example, Plaintiffs also challenge the inability to treat unpaid rent accrued during the life of the Proclamations (well over a year) as an enforceable debt unless one can meet an impossible and circular requirement that they offer a repayment plan tailored to personal health and financial details of tenants, who in turn are not required to provide such information and have an obvious incentive not to. The key to ever being able to treat the unpaid rent accrued during the life of the Proclamations as a debt is by its nature illusory. Landlords generally do not know the individual health or economic circumstances of tenants. *See* ECF 23, at 4 ¶ 20.

Defendants acknowledge this reality in dismissive fashion, stating: "The Governor's Office opted not to place the burden of proof on tenants [of showing a Covid-related hardship because] … in many cases, tenants in genuine economic distress due to the pandemic are unable to provide adequate proof of their distress." ECF 31, at 6-7. The Proclamations not only fail to require tenants to establish a hardship, they do not require tenants to communicate with their landlords to fashion a reasonable repayment plan (which ultimately leads to repayment), effectively escaping their debts through silence and evasion. Defendants do not dispute this fact; they instead try to soften it with non-mandatory encouragement to tenants to communicate. *See* ECF 30, at 17-18. If they don't communicate, there is no negative consequence and only a positive one arising from their silence—escape from ever having to pay their past due rent.

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Defendants attempt to discredit Plaintiffs' argument because it is common for landlords to request information about the source of potential tenants' source of income. ECF 30, at 60. But their own argument and very reason for the Proclamations is that the Pandemic has dramatically changed everything. Of course, landlords were aware of employment status of tenants when they applied to become tenants, but they are not aware of the impact of COVID-19 on their tenants' income or their health—both of which are essential to being able to offer a plan and being able to treat unpaid rent as an enforceable debt. The CDC eviction moratorium at least required tenants to certify hardship; the Proclamations do not and thereby impose an impossible barrier to seeking repayment of rent.

As recognized in *Heights Apartments, LLC v. Walz,* ___ F.Supp.3d ___ 2020 WL 7828818 (D. Minn. Dec. 31, 2020), the CDC moratorium was "narrower" than the Minnesota moratorium; plaintiffs had standing. For instance, the court noted that any violation of any contractual obligations (except the obligation to pay rent) authorized eviction under the CDC moratorium, but not under the state moratorium. The Proclamations do not allow eviction for violation of other contractual terms, *i.e.*, no pets, limited number of people residing, pay utilities, etc. As in *Heights Apartments*, the Plaintiffs here have standing.

Second, the CDC moratorium has been declared to be invalid in several courts. *See, e.g., Tiger Lily, LLC v. United States Department of Housing and Urban Development,* 992 F.3d 518 (6th Cir. 2021); *Skyworks, Ltd. v. Centers for Disease Control and Prevention*, ___ F.Supp.3d ___, 2021 WL 911720 (N.D. Ohio March 10, 2021); *Terkel v. Centers for Disease Control and Prevention*, ___ F. Supp. 3d

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___, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021); *Alabama Association of Realtors v. United States Department of Health and Human Services*, __ F.Supp.3d __, WL 1779282 (D. D.C. May 5, 2021). It cannot equate to no standing.

Third, the CDC moratorium requires a specific declaration by tenants who "must provide a copy" to their landlords. https://www.federalregister.gov/ documents/2020/09/04/ 2020-19654/temporary-halt-in-residential-evictions-to-prevent-the-further-spread-of-covid-19#footnote-5-p55293. No tenant of Plaintiffs has filed such a declaration. *See* Reply Statement of Material Facts Not in Dispute and Statement of Disputed Material Facts, and declarations cited therein. The CDC moratorium is not what constrains Plaintiffs; they have standing to challenge the Proclamations.

B. Plaintiffs' Claims are not Moot.

Defendants argue that Plaintiffs' claims are "imminently moot" because the Proclamations end of June 30, 2021. ECF 30, at 28. But the inability to treat rent as an enforceable debt for the time period of the Proclamation continues, even if people can obtain rent beginning on July 1, 2021 for post-Proclamation time periods. The new statute on which Defendants rely states that the **eviction moratorium** ends on June 30 and provides for repayment plans in Section 4, but the remedy to the property owner if tenant defaults under a repayment plan is apply for reimbursement from the state (with no guarantees of it being available) or proceed with an unlawful detainer. Section 4 (2). The new law says fails to revoke the prohibition on treating unpaid rent (or fees) as an enforceable debt.

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Defendants are essentially arguing that the case will be moot because one of their co-equal branches of government ended the moratorium. "[A] defendant cannot automatically moot a case simply by ending is unlawful conduct once sued." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). "Given this concern, our cases have explained that 'a defendant claiming that its voluntary compliance moots a case bears the **formidable burden** of showing that it is **absolutely clear** the allegedly wrongful behavior could not reasonably be expected to recur.'" *Already, LLC v. Nike, Inc.*, 568 US 85, 91 (2013) (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 190 (2000) (emphasis added)). Defendants do not even attempt to meet this burden. Given the uncertain nature of the corona virus and its variants and the extent to which Defendants defend the Proclamations, the Court should not assume that Defendants are promising never to enforce a Proclamation like the ones at issue. Because Defendants cannot meet the high burden of proving a Proclamation will never recur, this case is not moot and the Court should decide the issues presented.

C. Eleventh Amendment immunity does not preclude this action.

Defendants argue that the Governor has Eleventh Amendment immunity, but do not make this argument in regard to the Attorney General. And for good reason. *Ex parte Young,* 209 U.S. 123, 157 (1908), allows federal court jurisdiction over state officials whose responsibility it is to enforce the challenged law. "The Eleventh Amendment …does not, however, bar actions for prospective declaratory or injunctive relief against state officers in their official capacities for their alleged

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violations of federal law." *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1133-34 (9th Cir. 2012).

The Governor was sued because the Proclamations challenged herein were issued by him alone. It appeared that he would have an interest in the legality of his own Proclamations. Moreover, under the Washington Constitution, the Governor has enforcement obligations as well. Wash. Const. art. III, § 5 provides that the Governor "shall see that the laws are faithfully executed." The Washington Supreme Court has recognized this as an enforcement duty. "[I]t is the right and duty of the executive department to see that the laws as thus interpreted are properly **enforced…. [T]he final determinations as to [the law's] enforcement and execution [is] lodged in the Governor."** *State ex rel. Hartley v. Clausen*, 146 Wash. 588 (1928), *quoted in Reiter v. Wallgren*, 28 Wn.2d 872, 881 (1947) (emphasis added). The notion that the Governor has no enforcement authority is contrary to Washington law.[2] He should not be cloaked with Eleventh Amendment immunity as provided in *Ex Parte Young*.

[2] Plaintiffs recognize that the Court dismissed the Governor in *MacEwen v. Inslee,* No. C20-5423, 2020 WL 4261323, at *2 (W.D. Wash. July 24, 2020), *cited in* Dkt. 30, at 30, on the assumption that the Governor did not have enforcement authority. Plaintiffs are unaware of what citations to Washington law were even made in that case and the Court should not impose an erroneous conclusion on Plaintiffs here.

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D. The Court can dismiss the Third Claim for Relief which asserts a state law claim.

Defendants contend that a federal court lacks jurisdiction to enjoin a state official's actions on the basis of violation of state law. ECF 30, at 30 (citing *Pennhurst State Sch & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984)). This is a defense which the state can waive. *See generally, Hill v. Blind Industries and Services of Maryland,* 179 F.3d 754 (9th Cir. 1999). Having not waived the defense, Plaintiffs agree that the Third Claim for Relief in the First Amended Complaint (ECF 27) may be dismissed based on Eleventh Amendment immunity grounds.

II
The Proclamations Cause a Taking of Property Covered by the Fifth Amendment to the United States Constitution

A. The Proclamations mandate a continued physical occupation of Plaintiffs' properties.

Given the undisputed fact that the Proclamations were intended and do require Plaintiffs to endure someone residing on their property who is not paying rent or complying with any contractual or statutory obligation in the landlord tenant relationship, Defendants nevertheless argue that there is no physical occupation which requires payment of just compensation simply because the physical occupation is not "permanent." ECF 30, at 32 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). The Court has never held that physical occupations less than "permanent" do not constitute physical takings.

Defendants also rely on *FCC v. Fla. Power Corp*, 480 U.S. 245, 252 (1987) for the notion that "statutes regulating the economic relations of landlords and tenants

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are not *per se* takings." *Id.* Of course, a statute regulating economic relations are not necessarily *per se* takings, such as a law requiring landlords to give tenants an explanation of the use of deposits for damages or return deposits under a certain deadline.[3] But the Court in *Loretto* was not stating, as Defendants imply, that **any** economic regulation of landlords can never be a *per se* taking, such as a mandate that property owners allow others to reside in their property for extended periods without paying rent. The Court in *Loretto* specifically addressed this: "[A] landlord's **ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation**." *Loretto*, 458 U.S., at 439, n. 17 (emphasis added). This is precisely what has occurred here.

Defendants next pivot to *Yee v. City of Escondido*, 503 U.S. 519 (1992). ECF 30, at 33. In *Yee*, landlords argued that they were subjected to a physical occupation of their rental properties when the City regulated rental prices. Defendants here quote the portion of the Court's decision describing the *Yee* plaintiffs' argument about being unable to evict; the Court did not find that to be necessarily true when reviewing the ordinance on its face. "On the face of the regulatory scheme, neither the city nor the State compels petitioners, once they have rented their property to

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[3] The Court in *Loretto* explained the type of injuries that do not require compensation—requiring "landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like." *Loretto,* 458 U.S. at 440. None of these are analogous to requiring tenants to remain in possession of property while paying nothing.

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tenants, to continue doing so." *Id.* at 527-28. The city ordinance did not require the tenants' continued occupation with there was "nonpayment of rent." *Id.* at 524.

Yee was basically a facial challenge to a price control and the Court naturally found that price controls did not compel occupation of property. The plaintiffs in *Yee* chose to have tenants under certain lease arrangements, including the payment of rent. The city ordinance was basically a price control allowing owners to receive rent, but not necessarily allowing increases in rent that they might otherwise want.

The present situation is quite different. Defendants mandate that Plaintiffs continue with the physical occupation of their property by people who pay no rent whatsoever. Continued physical occupation is mandated. While that result may be an appropriate response to the Pandemic, the takings clause of Fifth Amendment does not prohibit the taking of property, it just requires payment of just compensation so that the burden of meeting this public need is shouldered by the public and not just those who are providing rental housing. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Defendants later attempt to discredit Plaintiffs for employing a "mishmash" of regulatory taking and physical taking jurisprudence. ECF 30, at 36. But that is exactly what the Proclamations involve—a regulation which mandates the continuation of a physical occupation. This is somewhat different from physical invasion cases where the government simply causes the invasion, as in flooding cases. This is a mix of the two types, and there is no reason that a physical occupation foisted on property owners or that a physical occupation mandated by a regulation that prohibits removal of the physical occupation should be treated

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differently. It is similar to *Loretto*, where the City ordinance mandated a physical invasion—it was a *per se* taking. 458 U.S. 419. The Supreme Court in *Yee* explained the supposed mishmash arising from taking by regulation of use and *per se* takings arising from physical invasion. "They are, rather, separate arguments in support of a single claim—that the ordinance effects an unconstitutional taking." 503 U.S. at 535.

Governmental actions which take property interests from owners do not always fall into neat little boxes. As Justice Ginsburg explained in *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23 (2012):

> [N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.

Id. at 31.

A California case explains *Yee* in the context of mandated physical occupation—*Cwynar v. City and County of San Francisco*, 90 Cal. App. 4th 637, 109 Cal.Rptr.2d 233 (Ct. App. 2001). In *Cwynar,* a city ordinance prohibited evictions even though payment of rent was still required. "*Yee* addressed a narrow issue—a facial challenge to a purely economic rent control law." *Id.* at 657.

> *Yee* does not support the proposition that the option of leaving the rental market altogether is a cure-all mechanism for government coercion. The City overlooks the fact that the challenged statute in *Yee* was a purely economic price control. In that context, the fact that the *Yee* plaintiffs voluntarily rented

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> their property necessarily established there was no government-authorized physical occupation.

Id. at 657. Unlike the plaintiffs in *Yee*, Plaintiffs here are not asserting a right to increase rent, but to receive rent from occupants of their property.

Defendants also take issue with *Arkansas Game and Fish Comm'*n, on the basis that it "did not hold that a temporary occupation of property constitutes a categorical taking." ECF 30, at 35. Nevertheless, the Court ruled that "if government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking." 568 U.S. at 26. The point is that the temporary nature of the taking does not exclude it from the protection of the Fifth Amendment. And it is beyond dispute that a physical occupation is a *per se* or categorical taking. *Loretto,* 458 U.S at 435.

Defendants also try to distinguish *Hendler v. United States,* 952 F.2d 1364 (Fed. Cir. 1991), on the basis that the concrete wells sunk on the plaintiff's property were "permanent," apparently because they were made of concrete. But that ignores both the reasoning and facts of the case. The trial court wanted more evidence to know whether the wells were "truly permanently affixed to plaintiffs' property," but the Federal Circuit explained that the focus on permanence "misperceives the thrust of the protections afforded by the Fifth Amendment." *Id*. at 1375.

> In this context, 'permanent' does not mean forever, or anything like it. A taking can be for a limited term—what is 'taken' is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute. (While called an

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> estate for years, the term can be for less than a year. *See generally* Cribbet, Principles of the Law of Property 54 (3d ed. 1989).)

Hendler, 952 F.2d at 1376 (thereafter addressing several Supreme Court decisions where the United States took property for a period of time and the property owners were paid a fair rental value).

> All takings are 'temporary,' in the sense that the government can always change its mind at a later time, and this is true whether the property interest taken is a possessory estate for years or a fee simple acquired through condemnation, or an easement of use by virtue of a regulation. …
>
> If the term 'temporary' has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is **transient and relatively inconsequential**, and thus properly can be viewed as no more than a common law trespass *quare clausum fregit*. **Our truckdriver parking on someone's vacant land to eat lunch is an example.**

Id. at 1376-77 (emphasis added).

Defendants claim that Plaintiffs' "pre-*Yee*" cases, cases relied upon by *Hendler,* "miss the mark," but Defendants miss the point. ECF 30, at 36. *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) and *United States v. Petty Motor Co,* 327 U.S. 372 (1946)[4] were cited for the undebatable assertion that a temporary taking of property (as in a temporary leasehold) requires payment of just compensation. *See* ECF 22, at 8, 11. Nothing in *Yee,* or any price control case, changes that rule.

B. The Proclamations take Plaintiffs' property rights in their contracts.

Defendants argue that "[p]hysical takings do not apply to interests in rental agreements." ECF 30, at 36. The takings clause requires compensation for the

[4] Plaintiffs apologize for an incomplete citation to *Petty Motor* in ECF 22, at 11.

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taking of contract rights regardless of whether it is denominated a "physical taking" or a "regulatory taking." But Defendants create a straw man to defeat Plaintiffs' argument. Defendants assert that *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) is "out of place" because it "involved a regulatory takings claim, not a physical one." ECF 30, at 36. Plaintiffs never described their taking of contractual interests as a physical taking. While *Cienega Gardens* involved the taking of contract rights in contracts with the federal government, the Fifth Amendment protection of contract rights is not limited to contracts to which the government is a party as Defendants argue. *See Armstrong,* 364 U.S. 40 (taking of materialmen liens which were contracts with nongovernmental entity); *Brooks-Scanlon Corporation v. United States,* 265 U.S. 106 (1924) (taking of contract with shipbuilder);

Defendants make no attempt to distinguish the other Supreme Court decisions cited by Plaintiffs that make this clear, such as *Lynch v. United States*, 292 U.S. 571 (1934); *Petty Motor Co*., 327 U.S. 372 and *United States Trust Co. of N.Y. v. New Jersey,* 431 U.S. 1, 19 n. 16 (1977), *cited in* ECF 22, at 11.

And, since the Fifth Amendment protects property interests recognized under state law (*Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998)), it is important that Washington law is unmistakable that contractual rights are property rights which can be taken by governmental action. *See, e.g., Spokane School Dist. No. 81 v. Parzybok*, 96 Wn.2d 95,104 (1981). Defendants assert that *Parzybok* does not remotely stand for the proposition that "rental income constitutes a property right" (ECF 30, at 41), but it does stand for the proposition that income from a

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contract is a property right. *Id.* For over a century, Washington has recognized that leases are contracts. *See, e.g., Matzger v. Arcade Bldg. & Realty Co.*, 80 Wash. 401 (1914). Contractual rights certainly include leasehold interests which in turn constitute property. *See State v. Trask,* 91 Wn. App. 253 (1998). Defendants provide no compelling argument that a lease is somehow not a contract.

C. The Proclamations take Plaintiffs' interests in security deposits and give them to tenants without providing security to Plaintiffs.

Plaintiffs have a property interest in their tenants' security deposits even if the deposits are returned to the tenant at the end of a lease when there is no need to tap into those deposits. Washington cases demonstrate the nature of security deposits. For instance, in *United States v. Security Indus. Bank*, 459 U.S. 70 (1982) (amendment to bankruptcy code to invalidate liens held not to be retroactive because retroactivity would destroy property rights); *De Laval Steam Turbine Co. v. United States*, 284 U.S. 61 (1931) (taking of contract rights to produce steam turbines). And as addressed in ECF 22, at 14, *Armstrong* involved the taking of a lien, which is like a security deposit.

The security deposits are funds in which the landlord and tenant both retain an interest. The Proclamations require the owner to relinquish all of his or her interests in the deposit related to unpaid rent. That fact is not disputed. Whether this is a taking of the money, which is protected under the Fifth Amendment, or the taking of contract right makes little difference. It is a taking nonetheless. Finally, although Defendants state that the security deposits are property of the tenant, citing RCW 59.18.280, that statute does not negate any interest the lessor has in the deposit.

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ECF 30, at 38. The Proclamations now claim that the deposit cannot be for the payment of unpaid rent even though the contracts say otherwise.

Defendants' attempt to distinguish *Armstrong* is unpersuasive. In *Armstrong*, the government bought property encumbered with liens and then claimed the liens couldn't be enforced. 364 U.S. at 46. Defendants' claim that "[c]ritically, the federal government took title to the underlying property at issue" is not as critical as they assert. ECF 30, at 38 (citing *Armstrong*, 364 U.S. at 43-44). Although it explained the events which caused the taking of the lienholder's liens, there was no claim or dispute regarding the underlying property. The taking claim was successfully made by the party who had the security interest in the property when that security interest was destroyed. *Id.* That is the same result of the prohibition on using a security deposit to recover unpaid rent. The result is that tenants who chose to leave and have the wherewithal to move and find a new residence now get their security deposit back entirely and the owner of the property they have been using for free for months gets nothing.

D. Declaratory relief is available for the Fifth Amendment claim.

Defendants argue that "equitable remedies" are not available, but then obliterate the distinction between injunctive and declaratory relief. Plaintiffs agree that they cannot get injunctive relief prohibiting the continuation of the Proclamations under the Fifth Amendment because the taking of property is not a violation of the Fifth Amendment. Logically, a legal act cannot be enjoined. The Fifth Amendment simply requires that just compensation is eventually paid. *See Ruckelshaus v.*

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Monsanto Co., 467 U.S. 986, 1016 (1984). There is nothing to enjoin. *See, e.g., Regional Rail Reorganization Act Case*s, 419 U.S. 102, 124–125 (1974).

But Defendants argue that declaratory relief is not available by citing three district court cases that suggest that declaratory relief would be tantamount to an injunction and injunctions are not authorized. ECF 30, at 39 (citing *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 391 (D. Mass. 2020); *County of Butler v. Wolf*, 2020 WL 2769105, *4 (W.D. Pa. May 28, 2020); *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337, 358 & n. 112 (E.D. Pa. 2020)). While there may be unique reasons declaratory relief was not granted in these cases based on the relief sought, or the argument and authorities presented to the courts in those cases, the Supreme Court is clear that declaratory relief is appropriate to determine whether a taking has occurred. The issue of the amount of just compensation may be determined by the parties or a court if necessary.

Ruckelshaus, a case involving mandatory disclosure of trade secrets, is a clear example. The Court concluded that there was no taking of trade secret data submitted to the Environmental Protection Agency after amendments to the governing statute in 1978. 467 U.S. at 1006. But for a different time period, a taking would occur. "EPA consideration or disclosure of health, safety, and environmental data will constitute a taking if Monsanto submitted the data to EPA between October 22, 1972, and September 30, 1978." *Id.* at 1013.[5]

[5] *Duke Power Co. v. Carolina Env'l Study Grp, Inc.,* 438 U.S. 59 (1978), expresses the same concept. The Declaratory Judgment Act "allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed

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But the District Court authorities Defendants cite are not persuasive because they all rely on one case that provides no explanation for its conclusion. *Baptiste* merely cites *Wolf* for the notion that declaratory relief would be the functional equivalent of an injunction, with no other analysis whatsoever. *Baptiste*, 490 F. Supp.3d at 391 (citing *Wolf,* 2020 WL 2769104, *4). And *Wolf* just asserts that declaratory relief is the functional equivalent of an injunction without any analysis either. *Id.* Like *Batiste, HAPCO* relies on nothing other than the conclusion in *Wolf*. In the present case, that is simply not true. A declaration here that the State may continue what it is doing so long as it eventually pays just compensation is not the functional equivalent of an injunction prohibiting the state's action. Quite the opposite, in fact.

In sum, Plaintiffs here seek a declaration under the Fifth Amendment that their property interests have been taken. The declaration sought cannot be the functional equivalent of an injunction because it would enjoin no activity of Defendants. The Fifth Amendment does not prohibit the taking of property, so the Proclamations may continue or be reinstated. But the constitutional uncertainty of whether a taking has occurred should be resolved.

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governmental action before potentially uncompensable damages are sustained." *Duke Power*, 438 U.S. at 71, n. 15; *see also Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704, 716-18 (1987).

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IV
The Proclamations violate the Commerce Clause

Defendants begin with their defense by referring to what other courts have done with other eviction moratoria and to the district court decision in *El Papel, LLC v. Inslee*, 2020 WL 8024348 (W.D. Wash. Dec. 2, 2020), which denied a preliminary injunction and did not rule on the merits on summary judgment or after trial. Plaintiffs contend that the most analogous authority is the Supreme Court decision in *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934), and the cases it relies upon, which Defendants agree is the leading case in modern Contract Clause interpretation. ECF 30, at 43.

In *Blaisdell*, the Court upheld a moratorium on foreclosure of mortgages due to economic conditions during the Great Depression. 290 U.S. 398. Importantly, the Court relied on three eviction cases arising out of New York. *Id*. at 440. Defendants have no response to these cases—all of which recognize that a moratorium on evictions was appropriate as long as the tenants were willing and able to pay a fair rent. *See* ECF 22, at 25-2. *Blaisdell,* and the cases on which it is based, require the conclusion that the protection of contractual rights is violated when the government bans evictions for nonpayment of rent and effectively prohibits the property owners from treating the unpaid rent as an enforceable debt.

A. The Proclamations as a whole undermine the contractual bargain.

The essence of the contractual bargain at issue is that tenants may live in residential property owned by Plaintiffs on the condition that they pay rent regularly, pay fees when their rent payment is late, post a deposit to cover damages

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they may cause and cover unpaid rent, and comply with rules related to protection of the property and/or other tenants or the neighborhood. The Proclamations undermine this contractual bargain by telling tenants that they cannot be evicted—even for nonpayment of rent—and that any nonpayment of rent can never be treated as an enforceable debt so long as the tenants do not give the property owner information about their financial, health or other circumstances. Under these new rules, the contractual bargain is completely upended.

Curiously, Defendants argue that the Court in *Blaisdell,*

> recognized that contractual obligations may be "impaired by a law which renders them invalid, or releases or extinguishes them[,]" such as a "state insolvent law" that wholly "discharge[s] the debtor from liability" for preexisting debts.

ECF 30, at 43 (quoting *Blaisdell*, 290 U.S. at 431). It is not clear whether Defendants are suggesting that the Court's use of the word "may" suggests that such results are permissible or that such results are possible. But lest there by any uncertainty, the Court's conclusion was that a law discharging a debtor from liability is 'invalid." *Id.*

However, in applying this conclusion, Defendants argue that the "same is true of the Moratorium here," not by looking at what is challenged in this case, but by referring to eviction moratoria in other locations, such as New York, Philadelphia and Connecticut. ECF 30, at 44. Notably, all of these out of state cases addressed eviction moratoria that simply postpone evictions. None dealt with a blanket prohibition on treating unpaid rent as an enforceable debt.

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The New York City eviction moratorium at issue in *Elmsford Apartment Associates, LLC v. Cuomo*, 469 F. Supp. 3d 148 (S.D. N.Y. 2020),

> temporarily permits tenants to apply their security deposit funds to rents due and owing—**provided the tenants replenish those funds at a later date**—and temporarily prohibits landlords from initiating eviction proceedings against tenants who are **facing financial hardship due to the pandemic.**

Id. at 155 (emphasis added). The Proclamations at issue here do not allow landlords to apply a security deposit to unpaid rent, but must, as Plaintiff Jevons has, return the deposit when a tenant is ready to move on even if rent remains unpaid. ECF 23, at 3. This is undisputed. *See* ECF 31. And, as addressed above, the eviction moratorium applies to every tenant and not just those facing financial hardship due to the pandemic.

Furthermore, the *Elmsford* court found it significant that the New York eviction moratorium did not prohibit eviction if there was an "unauthorized sublease" or if the tenant "overstays their agreed lease term." *Id*. at 159. And particularly noticeable is the fact that the New York eviction moratorium does not suspend "the landlords' right to initiate a common law breach of contract action in the New York State Supreme Court [the trial court] to redress a tenant's failure to perform its payment obligations under his or her lease." *Id.* All of this is prohibited in Washington. The very reasons the New York moratorium was upheld are reasons the Proclamations at issue here should be held to violate the Commerce Clause.

Similarly, the Court in *HAPCO* was not resolving the merits but merely denying a preliminary injunction; nevertheless, it also involved an eviction moratorium with differences pertinent to the present case. 482 F. Supp.3d at 35. The eviction

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moratorium in *HAPCO* applied only until a landlord and tenant went through mediation.

> Once the [mediation] program is implemented, the bill provides that "no landlord shall take steps in furtherance of recovering possession of a residential property occupied by a tenant who has suffered a COVID-19 financial hardship" without participating in a conciliation conference.

Id. at 346.[6] The Philadelphia law also allowed tenants to pay their unpaid rent over a nine month period to avoid eviction. *Id.* at 347. These are critically distinguishing facts from the Proclamations. The burdens Plaintiffs' suffer would be substantially less under the rules in Philadelphia, but the Washington Proclamations are at issue here. The conclusions in *HAPCO* about far more reasonable protection of COVID-19-affected tenants does not support the legality of the Proclamations.

Defendants' reliance on *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199 (D. Conn. 2020) fares no better. ECF 30, at 44. Similar to *HAPCO,* the decision in *Auracle Homes* is also the denial of a preliminary injunction—an extraordinary remedy. 478 F. Supp. 3d at 217. The executive orders challenged in *Auracle Homes* prohibited eviction proceedings, created an automatic 60 day grace period for rent payment, and allowed tenants to use security deposits for unpaid rent if that tenant has sustained a significant loss in revenue. *Id.* at 209-10. These are far less burdensome than what is at issue in the Proclamations at issue herein.

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[6] Renters were entitled to a rebuttable presumption of experiencing a COVID-19 related financial hardship "by submitting a certification of hardship." *Id.* at 347. In Washington, tenants do not have to certify anything.

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Defendants next distinguish *Bronson v. Kinzie*, 42 U.S. 311 (1843), on the same basis that it was distinguished in *Blaisdell* (ECF 30, at 45), that contractual remedies can to some degree be altered. *Bronson* and *Blaisdell* both recognize that the state may adjust contractual remedies, but the question under this point is whether the Proclamations' adjustments constitute a significant impairment.

As the Court in *Bronson* stated,

> Whatever belongs merely to the remedy may be altered according to the will of the state, **provided the alteration does not impair the obligation of the contract.** But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution.

Bronson, 42 U.S. at 315-16 (emphasis added).

Importantly, *Blaisdell* did not overrule *Bronson*. Rather, the *Blaisdell* court distinguished it on the following basis: "the extension of the period of redemption was unconditional, and there was no provision, **as in the instant case,** to secure to the mortgagee the **rental value of the property during the extended period.**" *Blaisdell,* 290 U.S. at 432 (emphasis added). When applied to the Proclamations, the moratorium on evictions is unconditional—one need not assert, let alone provide any evidence, that the tenant has a Covid-19 related hardship or any hardship at all and there is no security in receiving the rental value. The Proclamations do not require any payment by tenants whatsoever or that tenants communicate with their landlords.

Defendants take issue with Plaintiffs' position that *Blaisdell* and the cases it relies upon involved statutes which required the possessor of the property to pay fair rent. ECF 30, at 46. These cases indeed secured the payment of fair rent, even

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if payment was not "contemporaneous" as Defendants assert. ECF 30, at 46. And Defendants also assert there were "other factors" at play which do not exist with the Proclamations, but these other factors further undercut Defendants' argument.

> [M]any essential contractual obligations remained intact, e.g., "the integrity of the mortgage indebtedness [was] not impaired" and "the validity of the sale and the right of the mortgagee-purchaser to title obtain a deficiency … [were] maintained.

ECF 30 at 46 (quoting *Blaisdell,* 290 U.S at 445-46). But those "essential" contractual obligations do not remain intact with the Proclamations. Plaintiffs' right to collect debt is completely impaired. Plaintiffs cannot treat unpaid rent that accrued during the time period covered by the Proclamations as enforceable debt.

The Court in *El Papel* made different conclusions about the effect of the Proclamations, perhaps based on the particular arguments made in that case. Defendants cite the *El Papel* court's conclusion that the law in *Blaisdell* did not "guarantee a monthly rent payment. Instead, it was up to a court to set the time and manner of repayment." ECF 30, at 46 (quoting *El Papel*, 2020 WL 8024348, at *7). Of course, having a court make similar determinations for Plaintiffs is absolutely prohibited—they cannot ask any court for a determination of how much a tenant owes or how it will be repaid. Those absent provisions—if present here—might have avoided the contracts clause problem that now exists.

Recognizing that the Proclamations do not require payment of rent, Defendants suggest that the allocation of dollars during the course of the pandemic to landlords and tenants eliminates the problem. ECF 30, at 46. The problem with this argument is twofold. First, the moneys available require the tenant to apply for the funds.

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Some tenants do not want to be bothered because there is no consequence to them if rent is not paid.

Second, an allocation of dollars generally ignores that the constitutional rights at stake in this lawsuit are personal rights.

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) (citations omitted).

That money is available generally does not ensure that Plaintiffs' rights are not violated. Only a court order that Plaintiffs' cannot be required to bear the financial burdens of the Pandemic which should be borne by the public as a whole will their rights be protected.

Finally, Defendants accuse Plaintiffs of misconstruing the Proclamations as preventing Plaintiffs "from treating unpaid rent as an enforceable debt and bringing a breach-of-contract action." ECF 30, at 47 (quoting ECF 22, at 28). Plaintiffs are not contending that the Proclamations prohibit the treatment of **any** unpaid rent as an enforceable debt, but Plaintiffs cannot treat as debt that unpaid rent from February 9, 2020 to June 30, 2021. Unpaid rent during that time period is lost forever. Again, the only way to be able to treat that as debt is if Plaintiffs are able to offer a repayment plan that is tailored to the personal health and financial circumstances of the tenant, which the Plaintiffs do not, nor are ever likely, to know. ECF 23, at 4.

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B. The Proclamations impair reasonable expectations.

Defendants argue that Plaintiffs should have no reasonable expectation of being able to evict or treat unpaid rent as an enforceable debt because landlord/tenant regulations are heavily regulated. ECF 30, at 47. While the Residential Landlord-Tenant Act (RLTA), Chapter 59.18 RCW, regulates many aspects of landlord/tenant relations, the question is whether the RLTA should have put lessors on notice and anticipated that they might not be able to initiate eviction proceedings when tenants fail to pay rent and not be able to treat a failure to pay rent for over a year unless the lessor knows the details of the tenants' health and financial circumstances? Nothing suggests that the Pandemic, or the Proclamations, should have been anticipated at the time Plaintiffs entered into their lease agreements.[7]

Several courts have recognized as much. *See HAPCO*, 482 F. Supp.3d at 351 ("Of course, when landlords entered into leases before the [eviction moratorium] was passed, they did not expect that these specific regulations would be enacted in response to a global pandemic."); Baptiste, 490 F. Supp. 3d at 384 ("the court finds that a reasonable landlord would not have anticipated a virtually unprecedented event such as the COVID-19 pandemic that would generate a ban on even initiating eviction actions against tenants who do not pay rent and on replacing them with

[7] In fact, the RLTA makes payment of rent the paramount duty of all tenants. *See* Wash. Rev. Code § 59.18.130 ("Each tenant shall pay the rental amount at such times and in such amounts as provided for in the rental agreement."); Wash. Rev. Code § 59.18.080 (payment of rent condition to tenant's exercising statutory remedies).

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tenants who do pay rent."). The notion that the consequences of the COVID-19 pandemic were foreseeable or something other than wholly unexpected action has no basis in reality.

Defendants then assert that Plaintiffs' contracts do not reference eviction as a consequence for failing to pay rent. ECF 30, at 48. But the contracts do. *See* Exhibit A, at 8 to ECF 26 (Jevons Decl.) (indicating suit for possession as a result of failure to pay rent); Exhibit A to ECF 25 (Burgstaller) "All Sections of the Landlord Tenant Act of the state of Washington, RCW 59.18, shall apply to this contract." Wash. Rev. Code § 59.18.370 specifically authorizes restoration of possession by the owner. "A contract depends on a regime of common and statutory law for its effectiveness and enforcement." *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'*n, 499 U.S. 117, 129-30 (1991). Therefore, "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms." *Farmers' & Merchants' Bank of Monroe v. Fed. Rsrv. Bank of Richmond*, 262 U.S. 649, 660 (1923). "This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." *Id.*

In sum, Defendants cite *Elmsford,* 469 F. Supp. 3d at 172 for the proposition that Contracts Clause issues arise only when the "'laws affect the validity, construction and enforcement of contracts.'" *Id*. (quoting *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 189 (1992). As addressed above, the Proclamations clearly impair the enforcement of Plaintiffs' leases with their tenants, which are contracts.

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C. The Proclamations hinder Plaintiffs' ability to safeguard their rights.

Defendants cite *Sveen v. Melin,* ___ U.S. ___, 138 S.Ct. 1815, 1822 (2018), as if it was declaring a universal truth that "a law impairing contractual remedies without nullifying them does not "prevent[] the party from safeguarding or reinstating [their] rights." ECF 30, at 29. Of course that is not universally true; it is possible for a law to impair contractual remedies without nullifying them, while also preventing a party from safeguarding or reinstating their rights. And that is what has occurred here. At some unknown time, Plaintiffs may be able to regain possession of their property, but they cannot safeguard or reinstate their rights to unpaid rent (or late fees) from March 2020 to the end of June 2021. Unlike the moratorium eviction in *Auracle Homes*, tenants here are not bound to their contracts. All they have to do is fail to give Plaintiffs information about their health or financial circumstances and they will never have to pay the unpaid rent from March 2020 to the end of June.

D. The Proclamations do not advance their significant public purpose in an appropriate and reasonable manner.

Defendants argue that the moratorium advances a significant public purpose in an appropriate and reasonable way solely because it is temporary, prevents economic dislocation and slows the spread of disease. ECF 30, at 50.

The eviction moratorium may have been the result of good intentions. But the prohibition on treating unpaid rent as an enforceable debt which would allow recovery of the debt even if tenants with Covid-19 related financial hardships cannot be evicted is a significant impact to Plaintiffs. The CDC moratorium required a certification that the tenants had Covid-19 impacts on their ability to pay

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rent. *See* https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDC-Eviction-Moratorium-03292021.pdf, *cited in* ECF 33, at 13-14. The Proclamations do not and Plaintiffs' tenants have not provided any such certification. *See* Second Decl. of Enrique Jevons filed concurrently herewith.

E. The Court should not follow other federal court's decisions that have upheld other eviction moratoria.

Defendants argue that the Court should apply the reasoning in *El Papel* and other courts regarding the eviction moratorium. ECF 30, at 55. As addressed above, this case challenges more than an eviction moratorium. Defendants argue that it is wrong to conclude that the court in *El Papel* looked only at the moratorium and not the wiping out of tenant's obligation to pay rent. ECF 30, at 55. While the court acknowledged in *El Papel* that the plaintiffs "take issue" with the language related to rent as an enforceable debt, the court's decision in *El Papel* scarcely touches the issue; it does not appear to have been the basis of the injunction motion.

In any event, here the Court should make a decision based on the facts and arguments presented in this case and not on unknown arguments presented to a different court. Unlike eviction moratoria challenged in other cases, this case challenges the Proclamations which make the opportunity to recover unpaid rent subject to an impossible condition—the offering of a repayment plan tailored to the tenants' unique financial and health circumstances, information that Plaintiffs' are unlikely to know and tenants are—in Defendants' own words—not "burdened" with providing. ECF 31, at 7-8 ¶¶ 29-30.

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In conclusion, the court in *Blaisdell* explained the following truth:

> Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

Blaisdell, 290 U.S. at 426. Such a close examination reveals that Plaintiffs have been deprived of their rights.

III
The Proclamations violate substantive due process.

Plaintiffs contend that the Proclamations violate due process for two reasons—they are vague in the ability of lessors to ever be able to treat a tenant's default as an enforceable debt and they are unduly oppressive. Defendants primarily argue that the "moratorium" is rational and legitimate and that is all substantive due process requires. ECF 30, at 56. For instance, Defendants cite *Richardson v. City & County of Honolulu,* 124 F.3d 1150, 1162 (9th Cir. 1997), for the concept that Plaintiffs bear an "extremely high" burden of showing the Proclamations are arbitrary or irrational. While that is not the test under which this claim is made, the Supreme Court in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 532 (2005), made clear that due process violations may be shown when a regulation fails in fact to substantially advance a legitimate government interest. *Id.* at 542: *see also Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 856 (9th Cir. 2007). Even under

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Defendants' rubric, substantive due process requires more than a legitimate purpose and means that are rationally related to that purpose.

A. Due process people from unduly oppressive governmental action.

Accusing Plaintiffs of asking the Court to "spurn" the rational basis analysis, Defendants argue that the Court in *Lingle* eliminated the unduly oppressive standard. ECF 30, at 57 (quoting *Lingle,* 544 U.S. at 542).[8] But the analysis the Court in *Lingle* "eschewed" was not the unduly oppressive standard, but the notion that substantive due process claims would be determined by a battle of experts as to whether a legislative enactment would actually achieve its stated purposes. *Id.* at 544-45. Plaintiffs do not contend the Proclamations do not achieve their purposes.

Defendants argue *Lingle*, 544 U.S. at 541, holds that cases such as *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), should be read with a deferential standard of review. ECF 30, at 57. But the due process question in *Lingle* was whether the regulation was "a valid exercise of the police power." *Lingle*, 544 U.S. at 541. Of course that is true, but it says nothing of the analysis of the undue oppressive standard in due process which the Supreme Court has applied in a variety of circumstances. *See, e.g., TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 453-54 (1993) (oppressive fines violate due process); *Heath v. Alabama*, 474 U.S. 82, 103 (1985) (relentless prosecutorial action is unduly oppressive); *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) (retroactive legislation).

[8] Plaintiffs believe Defendants were intending to refer to 544 U.S. at 545 because that is where the quotation exists in *Lingle*.

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The undue oppression prong is a necessary component of this evaluation because "[t]here is no reasonable or rational basis for claiming that the oppressive and unfair methods [are] in any way essential the [legitimate government objective]." *Haynes v. State of Wash.*, 373 U.S. 503, 519 (1963). Due process protects people "from an unfair allocation of public burdens." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 618 (2013). This protection exists regardless of whether the regulation will rationally achieve its purpose. The Proclamations are blatantly seeking to force the responsibility of shouldering a societal burden on one group—the owners of rental housing.

Defendants note that the Supreme Court in *Blaisdell* summarily disposed of a due process claim. ECF 30, at 58. As addressed above, *Blaisdell* simply delayed foreclosure and had no impact on the underlying debt, and specifically relied on three cases arising out of New York where the continuing obligation to pay the debt was critical. *Blaisdell,* 290 U.S. at 440. A delay in possession was not oppressive.

Finally on this point, Defendants assert that the right to determine the conditions under which someone stays on one's property is an "economic interest, not a fundamental right, or liberty interest." ECF 30, at 58. In support, they cite *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997), which describes certain rights which invoke heightened scrutiny. *Glucksburg* does not state either that the rights it lists are frozen in time or that there is no other intermediate standard or review. Defendants also cite to *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'l Prot.,* 560 U.S. 702, 721 (2010), for the notion that "liberties protected by substantive due process do not include economic liberties," but this language did

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not gain a majority of the court.[9] While economic interests are not free from regulation, due process requires them to be free from undue oppression.

B. The Proclamations violate due process by being void for vagueness.

Defendants' primary response to Plaintiffs' void for vagueness argument is that the doctrine "does not apply, because this provision does not impose criminal punishment or civil penalties on the Landlords." ECF 30, at 59. But that is not true. The Proclamations are quite clear: "Violators of this order may be subject to criminal penalties pursuant to RCW 43.06.220(5)." Proclamation 20-19.6. The statute provides: "Any person willfully violating any provision of an order issued by the governor under this section is guilty of a gross misdemeanor." Plaintiffs cannot treat unpaid rent as a debt without running this risk of criminal penalties.

Defendants argue that Plaintiffs have not shown how they attempted to learn about tenants' personal financial and health circumstances. ECF 30, at 60.

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[9] Defendants also cite *Rubinovitz v. Rogato*, 60 F.3d 906, 910 (1st Cir. 1995), for the conclusion that there is no "fundamental right" to evict a tenant. ECF 30, at 59. The Plaintiffs in *Rubinovitz* were claiming they were treated differently because they evicted someone, not that they were denied the right to evict. Notably, the First Circuit did not decide whether there was a "right to evict" for purpose of due process but for Equal Protection Clause purposes. *Id*.

That is different from the situation at hand. Plaintiffs have people occupying their property who are deemed by the Proclamations to no longer have to pay rent or late fees or comply with their contractual obligations in any way.

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Tenants—well within their rights—do not provide that information. *See* ECF 26, at 3 ¶ 7; ECF 25, at 3 ¶ 6 and Second Declaration of Enrique Jevons filed contemporaneously herewith. Defendants also assert that Plaintiffs "would have some knowledge of tenant's financial circumstances, given that virtually all landlords require prospective tenants to disclose (and verify) their income." ECF 30, at 60 (emphasis added). Surely the requirement for a reasonable repayment plan in light of the tenant's financial circumstances cannot be based on their verified income when the tenancy began. The whole point of a repayment plan based on tenant's financial (and health) circumstances assumes there was a disruption in the tenant's finances due to Covid-19. (Wash. Rev. Code § 49.60.030) prohibits treating people differently based on their medical condition.) The repayment plan's trigger being information unavailable to Plaintiffs and completely in tenant's control, who have no obligation or incentive to cooperate, subjects Plaintiffs to an impossible procedure hurdle to being able to treat unpaid rent as an enforceable debt.

In sum, the Proclamations do not require tenants to establish a hardship or even communicate with their landlords to fashion a reasonable repayment plan. It is logical that that tenants would not want to share private information, especially that which is the trigger that would make them liable for debt.

C. Defendants do not respond to the unconstitutional conditions argument.

Plaintiffs argue that unconstitutional conditions are a feature of substantive due process. ECF 22, at 37. Defendants make no response.

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D. Plaintiffs' due process claims are not subsumed into other claims.

Defendants argue that Plaintiffs cannot pursue a substantive due process claim when other claims are at issue. ECF 30, at 60-61 (citing *Stop the Beach Renourishment,* 560 U.S. at 721). The portion of the cited case was not adopted by a majority of the Court; it was adopted only by Justices Scalia, Alito, Thomas and the Chief Justice. *Id.* Plaintiffs agree that explicit textual sources of constitutional protection must be analyzed first because of the specificity of their application. But other constitutional provisions do not necessarily address the protection of substantive due process. For instance, just because a regulation of property does not cause a Fifth Amendment taking does not mean the constitution no longer provides protection from arbitrary, oppressive or vague regulations.

The controlling authority on this point is *Crown Point Development,* 506 F.3d 851, which explains: "*Lingle* pulls the rug out from under our rationale for totally precluding substantive due process claims based on arbitrary or unreasonable conduct." *Id.* at 855. Similarly, there is no specific textual source for protecting Plaintiffs from unduly oppressive or vague regulations. Hence, Defendants are not entitled to judgment on this claim.

IV
Plaintiffs are entitled to declaratory relief under Section 1983

Defendants do not deny that violations of the constitutional provisions asserted entitle Plaintiffs to declaratory relief under Section 1983. Their only response is their position is that the constitutional provisions were not violated. For the reasons

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addressed above, the Proclamations violate constitutional rights and Plaintiffs are entitled to declaratory relief under Section 1983.

Conclusion

Plaintiffs encourage the Court to grant their motion for summary judgment and deny the Defendants' cross-motion. Plaintiffs recognize the Pandemic and its economic impacts are significant. But unless Plaintiffs' rights are also recognized, the burden of dealing with this crisis will be inappropriately foisted on them. Unlike the businesses which were shut down, Plaintiffs were and are required to continue their business—without compensation. The solution to a public burden should be paid by the public which is the underlying basis for the Fifth Amendment. This motion for protects Plaintiffs lest they be saddled with providing housing at their own expense instead of an expense shared by the community as a whole.

Respectfully submitted this 9th day of June, 2021,

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